Nos. 00-568 and 00-809

In the Supreme Court of the United States

STATE OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ENRON POWER MARKETING, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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QUESTIONS PRESENTED

In its Order No. 888, the Federal Energy Regulatory Commission found that public utilities subject to its jurisdiction under the Federal Power Act (FPA or Act), 16 U.S.C. 791a *et seq.*, had discriminated unlawfully in providing access to their facilities for transmitting electric power, and had the ability and incentive to continue to do so. As a remedy, Order No. 888 requires those utilities to provide nondiscriminatory access to their transmission systems, thereby facilitating competition in the market for electric energy.

1. In No. 00-568, the question presented is whether the court of appeals correctly determined that Section 201 of the FPA, 16 U.S.C. 824, authorizes the Commission to exercise jurisdiction over the service of transmitting in interstate commerce electric energy that is sold at retail, where the transmission service is "unbundled" from the State-regulated retail sale of energy and the retail customer has the ability to choose a preferred power supplier.

2. In No. 00-809, the question presented is whether the court of appeals properly deferred to the Commission's determination that it lacks jurisdiction over retail transmission service that is sold together with electric energy in a single "bundled" transaction between a public utility and its retail customer, where the retail customer cannot choose a preferred power supplier.

PARTIES TO THE PROCEEDING

The petitioners and intervenors in the court of appeals are set forth in Volume II of the Petition Appendix in No. 00-568 at R1-R7 and in Volume II of the Petition Appendix in No. 00-809 at 683a-688a.

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OPINIONS BELOW

The opinion of the court of appeals (1 Pet. App. 3a-121a)[1] is reported at 225 F.3d 667. The relevant orders of the Federal Energy Regulatory Commission are reported as follows: Order No. 888, 61 Fed. Reg. 21,540 (1996) (excerpted at 1 J.A. 42-430), and Order No. 888-A, 62 Fed. Reg. 12,274 (1997) (excerpted at 2 J.A. 517-791).

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[1] Unless otherwise indicated, all references to "Pet. App." are to the petition appendix in No. 00-809. We refer to the state petitioners in No. 00-568, collectively, as "New York."

JURISDICTION

The judgment of the court of appeals (1 Pet. App. 1a-2a) was entered on June 30, 2000. Petitions for rehearing were denied on August 22, 2000 (1 Pet. App. 123a-124a). The petition for certiorari in No. 00-568 was filed on October 12, 2000. The petition in No. 00-809 was filed on November 20, 2000. The petitions were granted on February 26, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Part II of the Federal Power Act, 16 U.S.C. 824-824m, are set out at 2 Pet. App. 652a-681a.

STATEMENT

This case involves one of the critical jurisdictional underpinnings of the Federal Energy Regulatory Commission's program for promoting competition in the electric power industry. Commission Order No. 888 requires public utilities to "unbundle" their generation and wholesale sales of electric power from their wholesale transmission of electric power, and to provide other power suppliers nondiscriminatory access to their transmission systems. Unbundling and "open access" to transmission systems enable energy producers to deliver electric power across the Nation's interstate power grids, and prevent utilities from using their control over essential transmission systems to undermine the increasingly competitive market for electric energy.

When crafting Order No. 888, the Commission exercised its jurisdiction in accordance with Part II of the Federal Power Act (FPA or Act), 16 U.S.C. 824-824m. Broadly speaking, Section 201 of the FPA gives the Commission jurisdiction over the transmission and wholesale sale of electric energy in interstate commerce, while leaving regulation of local distribution and retail sales of electric energy to the States. 16 U.S.C. 824. The Commission interpreted Section 201 as preserving the States' historical jurisdiction over traditional monopoly arrangements—under which retail customers buy electric energy, transmission service, and local distribution service from a single, regulated supplier for a single charge. Accordingly, under Order No. 888, States may continue to regulate the entirety of those bundled retail sales, just as before. But if a public utility voluntarily permits retail customers to purchase power from competing suppliers, or if a State chooses to require such competition, then the Commission's new open-access rule would extend to the utility's separately offered service of transmitting electric energy in interstate commerce in connection with the unbundled retail sale of energy. Even in that case, however, the State would continue to have exclusive jurisdiction over the retail sale of energy and over local distribution of the energy.

The court of appeals found that the Commission's approach is consistent with the jurisdictional rules established by Congress in the FPA. 1 Pet. App. 27a-39a. The court rejected the argument of some States that the Commission may not regulate *unbundled* transmission of electric power that is associated with retail sales. At the same time, the court rejected the argument of some industry members that the Commission was required to apply the provisions of its standard open-access transmission tariff to *bundled* retail sales that historically have been regulated by the States.

1. Electric power systems have three basic functions: generating electric energy, transmitting the energy in bulk, and distributing it to consumers. Electric energy is generated at a generating station, and its voltage is increased ("stepped up") for transmission over high-voltage lines. After the energy travels to the vicinity of the end user over transmission lines, its voltage is reduced ("stepped down") for delivery over a local distribution system.[2]

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[2] See H. Rustebakke, *Electric Utility Systems and Practices* 1, 13-26 (4th ed. 1983) (describing typical power systems); Energy Information

Power systems in the continental United States are organized into three major networks, or "grids": the Eastern Interconnect, the Western Interconnect, and the Texas Interconnect (which covers most of Texas). Each grid is formed by high-voltage connections that are used to transfer electric energy from one utility on the grid to another. The Eastern Interconnect and the Western Interconnect are themselves connected. See *Electric Power Industry 2000* 13-14 & Fig. 7. Wholesale exchanges of power over the grids enable utilities to obtain electric energy from sources other than their own generating plants. The grids therefore provide utilities with access to lower-cost sources of power and improve the reliability of the utilities' services. *Id.* at 23. Today, "[v]irtually all" utilities in the continental United States are connected to a major grid. *Id.* at 14. Physically isolated power systems "have become a thing of the past." 2 Pet. App. 584a-585a.

Within each grid, electric energy follows the path of least resistance. The energy divides among multiple paths—which may or may not be owned by the utility that generates or sells the power—in order to find the path of least resistence between the generating station and the demand for power ("load"). 2 Pet. App. 612a & n.144. That flow of energy over parallel paths, known as "loop flow," is inevitable unless there is a direct ("radial") connection between the generation facility, at one end, and the load, at the other. See *ibid.*; R. Sarikas, *Introduction to Electrical Theory and Power Transmission* 56-57 (1995) (discussing radial transmission). Accordingly, "if any part of a supply of electric energy comes from outside of a state it is, or may be, present

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Administration, U.S. Dep't of Energy, *The Changing Structure of the Electric Power Industry 2000: An Update* (*Electric Power Industry 2000*) 9-16 (Oct. 2000) (available at <http://www.eia.doe.gov/cneaf/electricity/chg_stru_update/update 2000.html>); see also *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 519-521 (1945) (describing utility's facilities).

in every connected distribution facility." *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 529 (1945).[3]

2. The interconnected nature of transmission grids, and their use in interstate commerce, have increased dramatically since 1935, when Congress enacted the relevant provisions of the FPA. At that time, the electric power industry was composed of largely self-sufficient utilities with their own generation, transmission, and distribution facilities. Vertically integrated electric utilities were deemed natural monopolies, and they sold their generation, transmission, and distribution services as a single bundled service to wholesale and retail customers, under the oversight of state regulators. 1 J.A. 190; 2 Pet. App. 578a; *Electric Power Industry 2000* 5. Because electric energy could not yet be transmitted efficiently over long distances, local utilities were not linked into large, centralized systems. See *United States* v. *Public Utils. Comm'n (California PUC)*, 345 U.S. 295, 302 (1953). Nevertheless, local monopolies did interconnect with neighboring utilities, and issues arose around exchanges of electric energy in interstate commerce, which were beyond the States' power to regulate. See, *e.g.*, *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). States likewise were unable to regulate the financial practices of the interstate holding companies that controlled many local utilities. The practices of those holding companies came under heavy criticism during the 1920s and early 1930s. See *Gulf States Utils. Co.* v. *FPC*, 411 U.S. 747, 758 (1973); *Electric Power Industry 2000* 5.

Congress enacted the Public Utility Act of 1935, ch. 687, 49 Stat. 803, to address those concerns. The Public Utility

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[3] Utilities typically contract to transmit power for each other "as if power flowed along one series of lines belonging to specific owners." 2 Pet. App. 612a. But "in reality power flows are rarely confined to a designated contract path." *Id.* at 612a n.144 (quoting *Indiana Mich. Power Co.*, 64 F.E.R.C. ¶ 61,184 (1993)).

Act "had two primary and related purposes." *Gulf States Utils.*, 411 U.S. at 758. First, Congress sought "to curb abusive practices of public utility companies by bringing them under effective control," which was the subject of Title I of the 1935 Act, known as the Public Utility Holding Company Act (§§ 1-33, 15 U.S.C. 79a through 79z-5.). See *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 75 (1990). Second, Congress wanted "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce," which was the subject of the provisions of the 1935 Act that became Part II of the FPA. *Gulf States Utils.*, 411 U.S. at 758. Part II of the FPA (§§ 201-214, 16 U.S.C. 824-824m) conferred on the Commission's predecessor (the Federal Power Commission (FPC)) jurisdiction over specified activities of "public utilit[ies]," which as a practical matter meant investor-owned utilities as distinguished from, for example, municipal utilities. See 16 U.S.C. 824(e) and (f).[4]

In Section 201(a) of the FPA, 16 U.S.C. 824(a), Congress "declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." Congress further declared that federal regulation of power generation, transmission of electric energy in interstate commerce, and the sale of electric energy at wholesale in interstate commerce, as provided in the Act, "is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. 824(a).

Section 201(b), the principal jurisdictional provision of Part II of the FPA, provides in pertinent part that the federal regulatory scheme "shall apply to the transmission of electric energy in interstate commerce and to the sale of

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[4] The Public Utility Act of 1935 also amended the hydroelectric power provisions now found in Part I of the FPA, 16 U.S.C. 791a *et seq.*

electric energy at wholesale in interstate commerce, but [with limited exceptions] shall not apply to any other sale of electric energy." 16 U.S.C. 824(b)(1). Section 201(b) further grants the Commission "jurisdiction over all facilities for such transmission or sale of electric energy," but generally denies the Commission jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. 824(b)(1).

Section 201(c) provides that electric energy is transmitted in interstate commerce, for purposes of Part II, if it is "transmitted from a State and consumed at any point outside thereof" (but within the United States). 16 U.S.C. 824(c).

The substantive provisions of Part II prohibit, among other things, unjust or unreasonable rates, and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. 824d(a) and (b) (FPA § 205(a) and (b)). Section 205(c) requires public utilities to file tariff schedules with the Commission, under such rules and in such form as the Commission may prescribe, showing their rates and terms for service, along with related contracts for service. 16 U.S.C. 824d(c). If the Commission finds that a public utility's rate "for any transmission or sale subject to the jurisdiction of the Commission," or any practice "affect[ing] such rate," is "unjust, unreasonable, unduly discriminatory or preferential," the Commission must prescribe a lawful rate or practice for the future. 16 U.S.C. 824e(a) (FPA § 206(a)).

Part II of the FPA was intended in part to "fill the gap" between federal and state jurisdiction created by *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, *supra*. See *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982). In *Attleboro*, the Court had held that the Commerce Clause prohibited Rhode Island (or Massachusetts) from regulating the rates charged by a Rhode Island utility for electricity delivered to a separate utility in Massachusetts, and that only Congress could regulate that wholesale transaction across state lines. See 273 U.S. at 84, 89-90. Part II of the Act filled the jurisdictional void created by *Attleboro* by establishing exclusive federal jurisdiction over such transactions. *New England Power*, 455 U.S. at 340.

When drafting the FPA, Congress understood that *Attleboro* and earlier cases established that the States could not regulate "any wholesale [power] transaction in interstate commerce." *FPC* v. *Southern Cal. Edison Co. (Colton)*, 376 U.S. 205, 213 n.8 (1964) (citing legislative history). Congress therefore extended federal regulation "to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1) (FPA § 201(b)(1)). Distinguishing wholesale sales from retail sales drew "a bright line easily ascertained" between federal and state jurisdiction. *Colton*, 376 U.S. at 215; see 16 U.S.C. 824(d) ("sale of electric energy at wholesale" means "a sale of electric energy to any person for resale").

The *Attleboro* Court also had broadly held that "[t]he transmission of electric current from one State to another * * * is interstate commerce." 273 U.S. at 86. Accordingly, and consistent with its goal of simplifying the process of deciding whether a particular transaction is subject to federal or state regulation, see *Colton*, 376 U.S. at 214-216, Congress included in Section 201(b)(1) an additional grant of federal jurisdiction over "interstate transmission," without any language limiting that jurisdiction to wholesale transactions. 16 U.S.C. 824(b)(1); see S. Rep. No. 621, 74th Cong., 1st Sess., Pt. 1, at 17, 19 (1935) (noting that "[o]ther features of th[e] interstate utility business," besides interstate wholesale transactions, are "immune from State control," and that federal jurisdiction under Section 201(b) "includes interstate transmission where there is no sale").

At the same time, Congress intended to "tak[e] no authority from State commissions." *New England Power*, 455 U.S.

at 341 (quoting H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935)) (emphasis omitted). It instead wanted to establish federal regulation "over those matters which cannot effectively be controlled by the States." S. Rep. No. 621, *supra*, Pt. 1, at 18. To that end, Congress provided that (as a general matter) the Commission's jurisdiction would not extend "to any other sale of electric energy" not made the subject of federal regulation in Section 201(b). 16 U.S.C. 824(b)(1). Furthermore, while the FPC would "have jurisdiction over all facilities for such transmission or sale of electric energy" within its jurisdiction,[5] as noted above the FPC was denied general jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. 824(b)(1).[6]

3. By the 1970s, technological changes were beginning to erode the natural monopoly character of the vertically integrated utilities. Relatively small and inexpensive generating plants, generally fueled by natural gas, came over time to provide a cost-competitive alternative to the utilities' large, capital-intensive plants. See 1 J.A. 61-67; *Electric Power Industry 2000* 44-45. Continued improvements in transmission technologies made it possible to transmit electric power at higher voltages over longer distances, so that utilities with lower-cost plants or excess capacity could sell

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[5] The Senate report explained that "[j]urisdiction is asserted also over all interstate transmission lines whether or not there is sale of the energy carried by those lines," because "no steps can be taken to secure the planned coordination of this industry on a regional scale unless all of the facilities, other than those used solely for retail distribution, are made subject to the jurisdiction of the Commission." S. Rep. No. 621, *supra*, Pt. 1, at 48. In the final bill, Congress assigned jurisdiction over generation facilities to the States rather than to the Commission. 16 U.S.C. 824(b)(1).

[6] Congress likewise did not assert federal jurisdiction "over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U.S.C. 824(b)(1).

their power to customers as many as 1000 miles away. 1 J.A. 67-68.

Federal legislation accelerated competition in the generation of electric power. Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117, to promote the development of alternative generating facilities that conserve traditional fossil fuels. 1 J.A. 68-70; see *FERC* v. *Mississippi*, 456 U.S. 742, 745-751 (1982). Among other things, PURPA required utilities to purchase power from the new alternative producers. See 16 U.S.C. 824a-3. The ensuing proliferation of alternative generation facilities demonstrated that vertically integrated public utilities need not be the only source of reliable power. 1 J.A. 70.

Other non-traditional sellers of electric power entered the market as well. They included independent power producers, which do not own any transmission or distribution facilities; affiliates of traditional utilities; and power marketers (such as Enron Power Marketing, Inc., the petitioner in No. 00-809), which sell power without owning the physical facilities used in connection with the sale. See 1 J.A. 71-73.

By the 1990s, problems involving access to the traditional utilities' transmission facilities had become a critical obstacle to the continued development of cheaper and more efficient sources of electric power. 1 J.A. 73-77. As the court of appeals explained in this case, "[p]ower generators not permitted to use utilities' transmission lines on reasonable terms have no way to transmit their power to customers." 1 Pet. App. 11a. In the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, Congress authorized the Commission to order utilities to provide transmission service, known as "wheeling," on a case-by-case basis for wholesale transactions. See 16 U.S.C. 824j, 824k (FPA §§ 211, 212); 1 J.A. 77-78. In practice, however, case-by-case consideration of wheeling requests entailed significant delays that limited the practical value of wheeling. 1 J.A. 81-83. So too, the Commission's powers to require nondiscrimination when utilities voluntarily offered transmission services to other generators, and in connection with utility mergers, were limited because they could be exercised only in those contexts. See 1 J.A. 83-90.

4. a. By the mid-1990s, new generating facilities were producing power at as little as one-fifth of the cost of electricity generated by the traditional utilities' most expensive large plants. See 1 J.A. 97. Consumers (particularly large industrial users) who paid high electric rates were demanding access to lower-priced energy. 1 J.A. 97-98; see *Electric Power Industry 2000* 41-44.

The Commission responded by, among other things, issuing in March 1995 the notice of proposed rulemaking (2 Pet. App. 553a-644a) that led to Order No. 888.[7] The Commission proposed to require public utilities to offer nondiscriminatory transmission services for wholesale power sales under standard tariff terms. See *id.* at 559a-560a. In proposing "open access," the Commission reasoned that the traditional utilities' exercise of "market power through control of transmission is the single greatest impediment to competition" in bulk power markets. *Id.* at 558a. "Transmission is the vital link between sellers and buyers," the Commission explained. *Ibid.* "To achieve the benefits of robust, competitive bulk power markets, all wholesale buyers and sellers must have equal access to the transmission grid. Otherwise, efficient trades cannot take place and ratepayers will bear unnecessary costs." *Ibid.*

b. In April 1996, the Commission issued Order No. 888 (1 J.A. 42-430). Based on comments submitted in response to its notice of proposed rulemaking, the Commission found

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[7] The Commission also initiated other proceedings "[t]o address the fact that the electric industry is becoming more competitive, and to remove barriers that might inhibit a more competitive industry." 1 J.A. 91-92 (listing Commission initiatives).

that public utilities were commonly discriminating in violation of Section 205 of the FPA, 16 U.S.C. 824d, by denying access to their transmission networks or providing only inferior access. 1 J.A. 178-191. The Commission determined that such discrimination would likely "increase as competitive pressures continue to grow in the industry, unless the Commission acts now to prevent such practices." 1 J.A. 185.

Invoking its authority under Sections 205 and 206 of the FPA to remedy the unlawful discrimination it had identified, the Commission required "functional unbundling" of wholesale interstate transmission services. 1 J.A. 106. Specifically, a public utility that owns or controls transmission facilities must: (1) obtain transmission service for its own wholesale transactions under terms and conditions set out in the same tariff of general applicability that the utility offers to unaffiliated transmission customers; (2) separately state rates for wholesale generation and transmission, as well as for "ancillary services" (such as scheduling and correction of energy imbalances) that are needed for basic transmission service; and (3) when using the generally available transmission service, obtain information about its own transmission system by means of the same electronic information network that is made available to unaffiliated transmission customers. 1 J.A. 106-107. The Commission published a pro forma tariff containing minimum terms and conditions for nondiscriminatory open-access service, and required utilities to file tariffs containing those terms. 1 J.A. 52; see 1 J.A. 683-691 (pro forma tariff). The Commission declined, however, to order "a more intrusive and potentially more costly mechanism" for addressing discrimination—requiring utilities to divest their transmission facilities. 1 J.A. 108-109.[8]

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[8] The Commission additionally addressed the problem of "stranded costs," *i.e.*, a utility's inability to recoup its sunk costs when wholesale

The Commission estimated that, as a result of its open-access requirement, consumers would realize cost savings of approximately $3.8 to $5.4 billion per year. 1 J.A. 99. The Commission also noted that at least 12 States, responding to the same market opportunities for consumer savings and economic growth, had taken steps to give retail customers a choice of power suppliers. 1 J.A. 95 & n.101.

The Commission recognized that its unbundling rule implicated the allocation of jurisdiction over electric power services between the federal government and the States. In its lengthy analysis of jurisdictional issues, see 1 J.A. 384-430, the Commission concluded that when a public utility delivers electric energy in interstate commerce from a third-party supplier to a purchaser who will resell it, Section 201(b) of the FPA provides the Commission exclusive jurisdiction over the rates, terms, and conditions of that transmission service and any facilities used to provide it, even if those facilities might also be labeled "local distribution" facilities. 1 J.A. 425-426.

The Commission next concluded that it also has jurisdiction over unbundled transmission services, and the facilities used to provide those services, where the power is transmitted in interstate commerce to *retail* customers who have the ability to choose their energy supplier. The Commission found it particularly "compelling" that Section 201 gives the Commission jurisdiction over public utilities' transmission of energy in interstate commerce "without qualification" and, in particular, without any limitation to transmission in connection with wholesale transactions. 1 J.A. 348-349. The Commission considered the illustrative

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customers take advantage of open access to purchase power from other suppliers. In general, Order No. 888 allows a utility to recover such costs from a former customer if the utility is able to show a "reasonable expectation" that, absent open access, it would have continued to sell power to the customer. See 61 Fed. Reg. 21,540, 21,628-21,664 (1996).

example of a retail customer who purchases energy in interstate commerce from a distant supplier, using the lines of intermediate utilities as well as the lines of the customer's previous power supplier. 1 J.A. 427. In that situation, the Commission determined that it would have jurisdiction over all the transmission facilities used by the intervening utilities to deliver the power. *Ibid.*

"The more difficult issue," however, was "whether some portion of the facilities used to transmit energy from the transmitting utility in closest proximity to the end user (the former supplier of the bundled product) [would be] local distribution facilities," and thus expressly subject to state regulation under Section 201(b)(1). 1 J.A. 427. The Commission concluded that "in most, if not all circumstances, some portion will be local distribution facilities." *Ibid.*; see also 1 J.A. 348. The Commission therefore identified seven "indicators" it will consider in determining whether particular facilities a public utility uses for its unbundled transmission of power for sale at retail are transmission facilities subject to federal jurisdiction in that context, or instead are local distribution facilities subject to state jurisdiction. 1 J.A. 428-429; see 1 J.A. 354-358.[9] The Commission stated, however, that, in order to avoid regulatory conflict and to take advantage of state regulators' expertise, it would defer to recommendations by state commissions when applying its seven factors. 1 J.A. 356-357.

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[9] The seven indicators are that: (1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems, but rarely out; (4) power that enters a local distribution system is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographical area; (6) meters measure flows into the local distribution system; and (7) local distribution systems have reduced voltage. 1 J.A. 322.

The Commission emphasized that it was not claiming authority over any part of traditional arrangements in which the public utility bundles the retail sale of power together with the transmission of that power. "[W]hen transmission is sold at retail as part and parcel of the delivered product called electric energy," the Commission explained, "the transaction is a sale of electric energy at retail," and therefore regulated by the States under Section 201(b). 1 J.A. 349. But when electric energy is sold separately from transmission, potentially by another supplier, "the jurisdictional lines change." 1 J.A. 349-350. "In this situation," the Commission reasoned, "the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves *only* the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of the Commission." 1 J.A. 350 (emphasis added).[10]

Relatedly, the Commission emphasized that in exercising jurisdiction over the rates, terms, and conditions of the unbundled transmission of power for sale at retail, it was not asserting jurisdiction to order utilities to unbundle their retail services, or to order transmission to any retail consumer. 1 J.A. 350; see also 1 J.A. 226-227 (finding unbundling of retail transmission and generation unnecessary to eliminate discrimination and declining to order it for that reason and due to jurisdictional concerns). Indeed, the Commission noted, Section 212(h) of the FPA, 16 U.S.C. 824k(h), "clearly prohibits" the Commission from ordering

[10] In practice, a power supplier that competes with the local public utility to serve an ordinary retail consumer typically serves that consumer by: generating or purchasing the necessary power; purchasing federally tariffed transmission service from the local utility (and potentially other utilities as well) to carry the power in bulk; purchasing distribution service from the local utility to deliver the power; and selling the power in a state-regulated retail transaction. The consumer would choose between energy suppliers based on the price and quality of their delivered power.

transmission to an ultimate consumer. 1 J.A. 350.[11] The Commission explained that its jurisdiction attaches only if the utility provides unbundled transmission in interstate commerce for energy sold at retail. *Ibid.* Therefore, a utility need not file a federal tariff for transmission in connection with retail sales unless it is ordered by the State to provide such transmission, or it offers that service voluntarily. *Ibid.*

The Commission observed that its jurisdiction over the rates, terms, and conditions of unbundled transmission would not affect the States' authority to regulate matters traditionally within their jurisdiction, such as the siting of public utilities' facilities, standards for local service reliability, and the availability of local retail electric service. 1 J.A. 351-353 & nn. 543, 544. Jurisdiction over such matters remains with the States, which "have jurisdiction in all circumstances over the service of delivering energy to end users." 1 J.A. 355.

c. In Order No. 888-A (excerpted at 2 Pet. App. 371a-551a and 2 J.A. 517-791), the Commission addressed petitions for rehearing of Order No. 888 and reaffirmed and clarified its jurisdictional holdings. See 2 Pet. App. 453a-456a; 2 J.A. 580-611. The Commission rejected the argument that, by asserting jurisdiction over all unbundled transmission in interstate commerce, it was "taking away" state jurisdiction over transmission in connection with retail sales. In the Commission's view, "[t]he fact that states historically regulated most retail transmission service as a part of a bundled retail power sale is * * * the practical result of the way electricity has historically been bought and sold," but power markets are "rapidly changing." 2 J.A. 593. The Commission explained that it was not intruding upon the States' historical jurisdiction, but rather applying the FPA

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[11] Section 212(h)(1) prohibits the Commission from issuing orders that are "conditioned upon or require the transmission of electric energy * * * directly to an ultimate consumer." 16 U.S.C. 824k(h)(1).

to a new paradigm—not specifically contemplated by Congress in 1935—in which transmission service is provided in a transaction that is separate from the retail sale of energy, and sometimes by a separate provider. In "[t]oday's unbundled world," the Commission concluded, the States' jurisdiction over retail sales of electric energy does not necessarily include jurisdiction over associated transmission. 2 J.A. 593-595.

5. The court of appeals affirmed Orders No. 888 and 888-A in all relevant respects. 1 Pet. App. 3a-121a. In particular, the court rejected arguments by some States that the Commission asserted too much jurisdiction over unbundled transactions, and from some industry members that the Commission asserted too little jurisdiction over bundled transactions. *Id.* at 27a-35a.

The state petitioners argued that Section 201 of the FPA gives the Commission authority to regulate transmission of electric energy only when the energy is consumed in a State other than the one in which it was generated, and only when the transmission has not historically been regulated by the States. They therefore maintained that the Commission exceeded its statutory authority by exercising jurisdiction over the transmission component of unbundled retail power transactions in interstate commerce. 1 Pet. App. 30a.

Addressing those arguments, the court observed that "[b]oth FPA § 201(a) and (b) clearly and unambiguously confer upon [the Commission] jurisdiction over the 'transmission of electric energy in interstate commerce.'" 1 Pet. App. 32a. Furthermore, the court of appeals explained, in *Jersey Central Power & Light Co.* v. *FPC*, 319 U.S. 61 (1943), and *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972), this Court upheld assertions of federal jurisdiction over public utilities based upon their interstate interconnection and the resulting energy flows. 1 Pet. App. 32a-34a. Following those decisions, the court of appeals "conclude[d] that the FPA gives [the Commission] the authority to regulate [the unbundled] transmissions at issue here, whether retail or wholesale." *Id.* at 34a. In the alternative, and even if this Court's decisions and the text of the FPA did not clearly compel the Commission's assertion of jurisdiction over the interstate transmission component of unbundled retail transactions, the court stated that it would be "hard pressed" to find the Commission's construction of the FPA "unreasonable or impermissible," and, accordingly, the court would defer to the Commission's construction under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984). 1 Pet. App. 35a.

The court of appeals also rejected the private petitioners' arguments that the Commission erred by not asserting jurisdiction over transmission in bundled as well as unbundled retail transactions, and, in doing so, subjecting retail service that currently is bundled to the rates, terms, and conditions of the pro forma open-access tariff set out in Order No. 888. 1 Pet. App. 30a-31a, 35a. The court explained that Section 201 of the FPA clearly establishes federal jurisdiction over transmission, and clearly preserves state jurisdiction over local distribution facilities and retail sales, but "[t]he statute is much less clear about exactly where the lines between those activities are to be drawn." *Id.* at 35a. In the court's view, "[a] regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce or as an integral component of a retail sale." *Ibid.* The Commission's decision to treat the transmission component of bundled retail sales as part of the retail sale of energy therefore "represents a statutorily permissible policy choice to which we must also defer under *Chevron*." *Ibid.*

The court of appeals next upheld, against challenge by the petitioner States, the Commission's exercise of exclusive jurisdiction over the transmission of power to a wholesale purchaser, to the extent it occurs over facilities that would be state-regulated "local distribution" facilities in the context of a retail transaction. 1 Pet. App. 35a-39a. The court determined that Section 201 "makes clear that all aspects of wholesale sales," including associated transmission and transmission facilities, "are subject to federal regulation, regardless of the facilities used." *Id.* at 38a.

Finally, the court of appeals upheld the Commission's approach to distinguishing local distribution facilities from transmission facilities in the context of unbundled retail transactions. 1 Pet. App. 39a. The court pointed out that while Section 201(b)(1) assigns the States jurisdiction over "facilities used in local distribution," Congress did not define this statutory phrase. *Ibid.* Because the Commission's multi-factor approach to interpreting and applying "undefined and ambiguous" statutory language was reasonable, the court concluded that it warrants *Chevron* deference. *Ibid.*

SUMMARY OF ARGUMENT

I. A. Section 201(b)(1) of the FPA authorizes the Commission to regulate "the transmission of electric energy in interstate commerce." 16 U.S.C. 824(b)(1). Because electric energy "commingles" in interconnected power systems without regard to its source or the ultimate user of the energy, see *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 463 (1972), Congress's express grant of authority over interstate transmission allows the Commission to regulate all transmission over power systems that are connected to an interstate power grid. New York never asked the Commission to consider its factual argument that the electric energy of a particular generating station is used only by those consumers nearest to the station, and that argument is inconsistent with the analysis uniformly applied in prior precedent.

B. New York's claim that federal jurisdiction over interstate transmission extends only to transmission associated with wholesale sales of energy likewise conflicts with the text of Section 201(b). Whereas Congress expressly confined the Commission's jurisdiction over *sales* of energy in interstate commerce to wholesale sales, the Commission's jurisdiction over interstate *transmission* is not similarly qualified. This Court's interpretation of the analogous jurisdictional provision of the Natural Gas Act, 15 U.S.C. 717(b), confirms that the Commission's jurisdiction over interstate transmission is in addition to, and is not limited by, its jurisdiction over wholesale sales of energy. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972).

The FPA does reserve jurisdiction over non-wholesale sales of energy, and over facilities used in the local distribution of energy, to the States. But those carve-outs from federal jurisdiction do not limit the Commission's jurisdiction over interstate transmission services.

C. Congress's declaration of policy in Section 201(a) of the FPA, 16 U.S.C. 824(a), further confirms that the Commission has jurisdiction over wholesale sales of energy and, separately, over interstate transmission of energy (whether for wholesale or retail sales). Although New York relies heavily on the FPA's legislative history to support its contrary argument, New York has not identified a single statement that the States would regulate interstate transmission if such transmission were offered separately from electric energy and consumers had a choice of energy suppliers. Because the legislators who drafted the FPA deemed vertically integrated public utilities to be natural monopolies, they did not contemplate the provision of transmission service for retail transactions separately from retail sales of energy.

Relying on cases addressing federal preemption of traditional state regulation, New York argues that because Congress did not contemplate unbundled transmission in connection with retail sales of energy, it did not make a sufficiently clear assertion of federal jurisdiction over that service. The absence of any historical tradition of state regulation of the new service of unbundled transmission for retail transactions renders inapposite the cases on which New York relies. In any event, Section 201(b)(1) does unequivocally assign the Commission jurisdiction over "the transmission of electric energy in interstate commerce." 16 U.S.C. 824(b)(1).

D. Order No. 888 leaves traditional state regulation undisturbed. The Commission explained in Order No. 888 that its rules would not divest the States of jurisdiction over retail sales of electric energy or local distribution facilities, and that the States retain jurisdiction over other local matters such as power production, siting of facilities, customer service, and local service reliability. The current energy crisis in California, moreover, does not support New York's policy arguments against Order No. 888. That situation involves supply and demand factors and rules governing power markets that are unrelated to the allocation of jurisdiction over unbundled transmission service.

II. Although Congress clearly intended to assign the Commission jurisdiction over transmission in interstate commerce when that transmission is separate from a sale of electric energy, nothing in the FPA clearly resolves the question of whether—in a market where energy can potentially be purchased from suppliers other than the traditional local utility—a public utility's bundled retail sale of energy and associated transmission should be treated as a single transaction subject to state regulation, or, instead, as both a transmission transaction subject to federal regulation and a retail sale of energy subject to state regulation. The Commission reasonably resolved that ambiguity in the statute by adhering to 65 years of practice under the FPA, and holding that transmission provided as part of a bundled retail sale of electric energy is subject to state jurisdiction.

ARGUMENT

Under the Commission's jurisdictional holding, traditional state regulation is not disturbed, but the Commission is able to apply its open-access tariff rules uniformly to all unbundled interstate transmission, thus preventing public utilities from abusing their control over the transmission facilities that are needed to support competitive power markets. Wholesale customers, and retail customers in States that have authorized competition in the retail market, can be served over interstate transmission grids on a nondiscriminatory basis, giving them a meaningful opportunity to consider alternative suppliers. But when an incumbent utility operates as a traditional monopoly utility and sells generation, transmission, and distribution to the consumer in a bundled package, the State will continue to regulate that bundled retail service. The Commission's interpretation and application of the FPA in these circumstances establishes a sound and workable regulatory framework that fully complies with the text of the Federal Power Act and the underlying legislative intent.

I. THE COMMISSION CORRECTLY INTERPRETED THE FEDERAL POWER ACT AS ESTABLISHING FEDERAL JURISDICTION OVER UNBUNDLED TRANSMISSION OF ELECTRIC ENERGY IN INTERSTATE COMMERCE

New York, as petitioner in No. 00-568, argues that the Commission is "attempting to preempt" (N.Y. Pet. Br. 10) state jurisdiction over transmission that historically has been regulated by the States, and that the FPA precludes federal regulation of any aspect of retail service. Those arguments are incorrect.

A. Transmission By A Utility That Utilizes An Interstate Grid Is "In Interstate Commerce"

The plain language of Section 201(b)(1) of the FPA establishes federal jurisdiction over "the transmission of electric energy in interstate commerce" and "all facilities for such transmission," but excludes from the Commission's jurisdiction "facilities used * * * only for the transmission of electric energy in intrastate commerce." 16 U.S.C. 824(b)(1). Section 201(c) provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof," but within the United States. 16 U.S.C. 824(c). Therefore, subject to exclusions that preserve state jurisdiction over retail sales of energy and over local distribution facilities (which we discuss in Part I.B., below), Congress vested the Commission with jurisdiction over all transmission of electric energy that involves origination and consumption in different States, and over all the facilities used for such transmission. That express conferral of authority on the Commission defeats New York's claim of state jurisdiction.

1. New York argues (N.Y. Pet. Br. 36-37, 43-46) that Section 201(b)'s textually broad assignment of jurisdiction over interstate transmission to the Commission is illusory, because the Commission may not exercise jurisdiction over a public utility's transmission service under that provision unless it "show[s] that essentially every electron used by a retail customer in each state [served by the utility] * * * is generated in a different state" (*id.* at 45 n.27). This Court's decisions foreclose New York's exceedingly narrow view of the Commission's transmission jurisdiction and establish the very different rule that when utilities connect their facilities to an interstate grid, their electricity presumptively flows "in interstate commerce" for purposes of Section 201. See 1 J.A. 389 ("[T]he highly integrated nature of the electric

system * * * results in most transmission of electric energy being 'in interstate commerce.'").

In *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945), the Court explained that the "[t]echnology of the business is such that if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility." *Id.* at 529. Accordingly, the Court observed in *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 381 (1983), that when a utility is "ultimately tied into a multicompany and multistate 'grid,' * * * it is difficult to say with any confidence that the power [the utility] provides to its [customers] at any particular moment originated entirely within the State." See also *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 336 (1982) (when the utility is connected to a regional transmission network, it is "impossible to contain" power generated by the utility within the State where it is generated).

A utility might attempt to take extraordinary measures to isolate its operations from interstate transmission. In *Connecticut Light & Power*, for example, federal jurisdiction was put in doubt when "the [utility] rearranged its operations with intent to cut every connection and discontinue every facility whose continued operation would render it subject to the Federal Power Commission's control." 324 U.S. at 518-519. But such a quarantine from the interstate grid must be complete to be effective for jurisdictional purposes. In *Jersey Central Power & Light Co.* v. *FPC*, 319 U.S. 61 (1943), Jersey Central was deemed to use its facilities "for the transmission of electric energy across state lines" even though it had no direct connection to any utility outside New Jersey, on the ground that one of Jersey Central's in-state customers exchanged power (some of which came from Jersey Central) with a New York company. *Id.* at 63-67. Similarly, in *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972), Florida Power was "unusually insular and independent" as a result of Florida's "peninsular nature" and the risk of hurricane damage to transmission lines. But although Florida Power had no direct connection with any out-of-state utility, it did connect with an adjacent Florida utility that, in turn, connected to a Georgia utility and an interstate power grid. *Id.* at 456-457. The Court held that Florida Power transmitted electricity in interstate commerce if any of its power reached the Georgia company, or vice-versa, "no matter how small the quantity." *Id.* at 454-455, 458, 461 n.10. Because Florida Power's energy "commingled" with the Georgia company's energy by virtue of the connection through the second Florida utility, this Court held that Florida Power transmitted energy in interstate commerce and was subject to the Commission's jurisdiction. *Id.* at 458, 461, 463.

New York asserts (N.Y. Pet. Br. 37-39, 40, 43-44) that *Jersey Central* and *Florida Power* addressed only the question of whether the public utility itself was subject to Commission jurisdiction, and did not hold that every transmission of electricity by an interconnected utility is subject to federal regulation. New York further suggests that considering transmissions to be "in interstate commerce" on the basis that the utility is connected to an interstate grid renders Section 201(c) of the FPA "[n]early [n]ugatory," because virtually all transmission would be across state lines. *Id.* at 44-45.

New York ignores that the Commission's open-access requirements apply only to "unbundled transmission *in interstate commerce.*" 1 J.A. 384 (emphasis added); see 2 J.A. 597 (Order No. 888-A) (asserting jurisdiction over "retail wheeling in interstate commerce that is ordered by a state or that is provided voluntarily"). The Commission acknowledged that it has no jurisdiction under Sections 205 and 206 of the FPA over unbundled retail transmission in Alaska, Hawaii, and much of Texas, "since transactions in those areas are intrastate." 1 J.A. 349 n.541. In theory, moreover, any public utility could attempt to show that particular transmissions involve exclusively intrastate energy. Cf. *Florida Power*, 404 U.S. at 457 n.8, 469 (discussing "tracing studies" and expert testimony used to establish federal jurisdiction); N.Y. Pet. Br. 45 n.28 (noting the theoretical possibility of closed, "radial" transmission systems).

The important point for present purposes, however, is the practical reality that physically isolated utilities "have become a thing of the past." 2 Pet. App. 585a. As utilities have connected to interstate networks, their electric energy has commingled with other energy in the networks, "just as molecules of water from different sources (rains, streams, etc.) would be commingled in a reservoir." *Florida Power*, 404 U.S. at 461. Consequently, the energy the interconnected utilities sell from the interstate grids is in interstate commerce. See *ibid.*; cf. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) (commingling of natural gas within Commission jurisdiction with gas outside of Commission's jurisdiction establishes Commission jurisdiction over all of the gas). Even New York's amicus recognizes that fact. Cal. Br. 11 ("[W]hen any part of the electricity moves across state lines, transmission all the way to the retail customer is transmission in interstate commerce.").

The overwhelmingly interstate nature of electrical transmission therefore has to do with the evolution of electric power systems, not Order No. 888. Indeed, Congress was well aware in 1935 that the Act gave the FPC broad jurisdiction over interconnected utilities and their transmission services.[12]

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[12] See S. Rep. No. 621, 74th Cong., 1st Sess., Pt. 2, at 5 (1935) (minority views) (stating that, because "it is almost always impossible to separate * * * transmission facilities between those used only for energy sold interstate and energy sold intrastate," the FPA would cause "almost complete displacement of State jurisdiction over electric utilities"); 00-568

New York concedes that the view "that all transactions affect the entire grid * * * is arguably accurate, from a theoretical standpoint" (N.Y. Resp. Br. 25), but nevertheless suggests that "[m]ost electricity used in the United States is generated in the state where it is used" (N.Y. Pet. Br. 5). See also *id.* at 45 n.28; N.Y. Resp. Br. 25-26. That argument echoes an argument this Court implicitly rejected in *Florida Power*. See 404 U.S. at 462 (noting Florida Power's argument that "all of [its] power will be exhausted * * * before the point, further down the line, where Georgia's load intervenes"); *id.* at 469 (upholding Commission finding that energy traveled across the Florida border). New York, moreover, did not present its factual claims about network operations to the Commission or to the court of appeals, and they therefore are not properly before this Court. See *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 36 n.21 (1968); *Glover* v. *United States*, 121 S. Ct. 696, 701 (2001); see also 16 U.S.C. 825*l*(b) (barring judicial review of claims not raised in petition for rehearing). In any event, even if a particular utility could show that its transmission service involves *mostly* intrastate energy, that would not defeat federal jurisdiction, for "Congress has not 'conditioned the jurisdiction of the Commission upon any particular volume or proportion of

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Pet. App. L-35 to L-36 (testimony of FPC Solicitor DeVane that the draft legislation "gives the Commission control over interstate transmission facilities" and that, "not withstanding 90 percent of the business is intrastate and 10 percent is interstate, this bill gives [the FPC] the power to regulate"); *Public Utilities Holding Co. Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess., Pt. 2, at 241 (1935) (testimony of Solicitor DeVane that interconnection between power systems "would tend to greatly increase the percentage" of power transferred across state lines); Enron Pet. Br. 30 n.20 (quoting House committee hearings). In *Florida Power*, Justice Douglas stated in dissent that, in light of the Court's holding, "every privately owned interconnected facility in the United States (except for those isolated in Texas) is within the FPC's jurisdiction." 404 U.S. at 471.

interstate energy involved.' " *Florida Power*, 404 U.S. at 461 n.10 (quoting *Connecticut Light & Power*, 324 U.S. at 536). Indeed, under the express terms of Section 201(b)(1), transmission facilities (other than local distribution facilities) are within the Commission's jurisdiction unless they are used "*only* for the transmission of electric energy in intrastate commerce." 16 U.S.C. 824(b)(1) (emphasis added).

B. Congress Did Not Exclude Unbundled Retail Transmission From The Commission's Jurisdiction Over Interstate Transmission

1. New York further argues (N.Y. Pet. Br. 30-31) that the Commission's jurisdiction over interstate transmission is limited to transmission provided in connection with wholesale transactions.[13] Section 201(b)(1), however, states that "[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). As the court of appeals held, that plain language "clearly and unambiguously confer[s] upon [the Commission] jurisdiction over the 'transmission of electric energy in interstate commerce,'" *in addition to* "the sale of electric energy at wholesale in interstate commerce." 1 Pet. App. 32a, 34a.

Decisions under the Natural Gas Act of 1938, 15 U.S.C. 717 *et seq.*, confirm that the Commission's jurisdiction over wholesale sales of energy *supplements* the Commission's jurisdiction over transmission, rather than limiting that jurisdiction. See 2 J.A. 420-425. Because large portions of

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[13] That argument is outside the scope of the question on which this Court granted certiorari. See Sup. Ct. R. 14(1)(a). Question 1 of New York's petition in No. 00-568, on which this Court granted certiorari, raised only the question of the Commission's power to assert jurisdiction over "*intrastate* retail transmissions of electric energy" transmitted "from generators to retail customers in the same state." New York Pet. i (emphasis added).

the Natural Gas Act "are in all material respects substantially identical" to the FPA, this Court "cit[es] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981). Moreover, as with the FPA, the Natural Gas Act was drafted in a time of bundled retail sales. See 1 J.A. 347, 422.[14] Section 1(b) of the Natural Gas Act, which is relevant here, closely tracks Section 201(b) of the FPA: Commission jurisdiction extends to "the transportation of natural gas in interstate commerce, [and] to the sale in interstate commerce of natural gas for resale," but "not * * * to any other transportation or sale of natural gas or to the local distribution of natural gas, or to the facilities used for such distribution." 15 U.S.C. 717(b). In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the Court explained that Section 1(b) establishes federal jurisdiction over: "(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Id.* at 636 (quoting *Panhandle E. Pipeline Co.* v. *Public Serv. Comm'n*, 332 U.S. 507, 516 (1947)). Accordingly, the Natural Gas Act "applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." *Ibid.* (quoting *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950)); see *id.* at 637-638. New York's argument that the Commission has jurisdiction over interstate transmission under the FPA only if the electric energy being transmitted is sold at wholesale fails under a parallel analysis.

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[14] As under the FPA, the Commission has implemented an open-access program under the Natural Gas Act. That program is similar in many respects to the open-access program established by Order No. 888. See generally *United Distribution Cos.* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (addressing jurisdictional and other challenges to open-access program under Natural Gas Act).

2. The Commission recognized (see generally 1 J.A. 384-430) that Congress, having established in Section 201(b)(1) "broad" federal jurisdiction over interstate transmission, wholesale sales, and facilities for such transmission and sales, then imposed specific limits on the reach of that grant in order "to respect state rights and local institutions." *Connecticut Light & Power*, 324 U.S. at 530. As relevant here, Congress carved out from the Commission's sphere, and reserved to the States, jurisdiction over (1) "any other sale of electric energy" and (2) "facilities used in local distribution." 16 U.S.C. 824(b)(1). Neither of those exclusions denies the Commission the authority to regulate unbundled interstate transmission in connection with retail sales.

a. "*Any Other Sale of Energy*." New York does not suggest that transmission in connection with retail sales is an "other sale of electric energy" for purposes of Section 201(b)(1). That reservation of state jurisdiction refers back to Congress's assertion, earlier in Section 201(b)(1), of federal jurisdiction over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Together, those two provisions establish the "bright line" between wholesale and retail sales of which this Court has spoken. *Colton*, 376 U.S. at 215; see S. Rep. No. 621, 74th Cong., 1st Sess., Pt. 1, at 48 (1935) (noting that Section 201(b) establishes federal jurisdiction over wholesale sales but not retail sales). The "sales" provisions simply do not address the Commission's jurisdiction over transmission. Transmission consists of transporting energy in bulk from generating stations, typically to the local distribution facilities that serve most end users; although transmission service may be sold with energy on a bundled basis, transmission is not itself a sale of energy. See 1 J.A. 349-350, 387-388.

b. "*Facilities Used In Local Distribution*." The Commission identified seven indicators that will guide its determination whether particular facilities of a public utility are transmission facilities subject to federal jurisdiction, or, alternatively, local distribution facilities subject exclusively to state jurisdiction when used in connection with a retail sale of energy. See 1 J.A. 425-430. Without challenging the specifics of that test, California suggests (Br. 7-17) that, when Congress assigned jurisdiction over "facilities used in local distribution" to the States, it disclaimed federal regulation of each and every facility, including transmission facilities, that supports retail electric service. See also N.Y. Pet. Br. 31-33.

California's theory cannot be reconciled with the text of Section 201(b)(1). As discussed above, that section limits the Commission's jurisdiction over interstate sales of energy to sales "at wholesale," but does not similarly limit the Commission's jurisdiction over interstate transmission and transmission facilities. 16 U.S.C. 824(b)(1). If Congress had intended to limit the Commission's transmission jurisdiction to transmission in connection with wholesale sales, it would have done so explicitly, just as it did when limiting the Commission's sales jurisdiction to wholesale transactions. Congress would not have hidden its intent regarding transmission service associated with retail sales in a reference to "facilities used in local distribution." 16 U.S.C. 824(b)(1).[15]

California's argument that all facilities used to provide transmission in connection with retail sales are "used in local distribution" also is contrary to industry usage of the term "distribution," which refers to lower-voltage circuits that provide electricity to customers over relatively short distances. Compare H. Rustebakke, *supra*, at 122 (defining "transmission") with *id.* at 199 (defining "distribution sys-

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[15] If Congress had intended to limit the Commission's transmission jurisdiction as California suggests, it logically would have begun Section 201(b) by saying something like: "The provisions of this subchapter shall apply to the sale of electric energy at wholesale in interstate commerce and to the transmission of electric energy in interstate commerce for such sales * * * ."

tem"). Indeed, legislative history that New York quotes selectively (N.Y. Pet. Br. 33), when read in full, confirms that Congress drew a jurisdictional line based on the physical distinction between transmission systems and local distribution facilities. See 00-568 Pet. App. L-32 (testimony of FPC Solicitor DeVane that "[t]he bill does not give the Commission any jurisdiction whatever over facilities used in local distribution or the transmission facilities that are used in connection with such local distribution, *unless they are also a part of the facilities that are used in interstate commerce*.") (emphasis added).

This Court's cases also foreclose California's claim that transmission facilities used for retail sales are local distribution facilities. In *Connecticut Light & Power*, the Court reviewed an FPC determination that local distribution begins where "the function of conveyance in bulk over a distance, which is the essential characteristic of 'transmission,' is completed and the process of subdividing the energy to serve ultimate consumers * * * is begun." 324 U.S. at 533 (quoting FPC order). Although the Court found the FPC's rationale for its jurisdictional line insufficient, both the majority and the dissenting Justices agreed with the FPC that distinguishing transmission facilities from facilities used in local distribution was a matter of identifying an "exact point" of demarcation in the network. *Id.* at 534, 539, 541. Similarly, the Court held in *Colton* that deciding whether facilities are used in local distribution implicates "the specialized experience of the FPC in determining such questions." 376 U.S. at 210 n.6. Neither case suggests that a facility is "local" simply because it is used in connection with a retail transaction.

FPC v. *East Ohio Gas Co.* likewise undermines California's theory that the retail or wholesale nature of the sale of energy determines whether facilities are used in local distribution. The natural gas company in that case sold gas recovered from wells in various States, but the company had facilities only in Ohio and sold its gas only at retail within Ohio. 338 U.S. at 467-468. The company argued that all of its facilities were local distribution facilities subject to exclusive state jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b). 338 U.S. 468-469. The Court rejected that argument, holding that federal jurisdiction extends to the transportation of gas in interstate commerce through high-pressure transmission lines for delivery to retail customers, and that local distribution does not begin until the point where the gas enters local mains. *Id.* at 468-470. The fact that the company sold "direct to consumers rather than for resale" was "immaterial." *Id.* at 473.

Contrary to California's contention (Br. 24-25), *East Ohio* remains good law. In *Louisiana Power & Light*, the Court explicitly relied upon *East Ohio*'s jurisdictional analysis and quoted it at length. 406 U.S. at 636-637 & n.13. And *East Ohio* has been "repudiated" (Cal. Br. 24) only in the sense that Congress later amended the Natural Gas Act by adding a new provision that effectively overturned *East Ohio* in the natural gas context. See *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 293 (1997). Congress has never made a parallel amendment to the FPA.[16] Finally, there is no inconsistency between the rule of *East Ohio* and *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920). See Cal. Br. 9-10, 24-25. *Pennsylvania Gas*, which predates both the FPA and the Natural Gas Act, stands for the proposition that "the furnishing of natural gas to local consumers within [a] city" is local service subject to state regulation. 252 U.S.

[16] The so-called "Hinshaw Amendment" added a new Section 1(c), 15 U.S.C. 717(c), to the Natural Gas Act. Section 1(c) provides, among other things, that facilities used in the transportation of natural gas in interstate commerce, or in the sale of natural gas in interstate commerce for resale, are exempt from the Commission's jurisdiction if the gas is received within or at the boundary of a State and is consumed within the State, and if the State has asserted jurisdiction. New York is, in effect, asking this Court to write a similar amendment into the FPA.

at 31. Consistent with that principle, Order No. 888 reaffirmed that the States have jurisdiction over sales of energy to retail customers. See 1 J.A. 349-350.

C. The Commission's Jurisdictional Holding Is Consistent With Congress's Purposes In Enacting Section 201

1. New York places great weight on Section 201(a) of the FPA, which "declare[s] * * * that Federal regulation * * * of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. 824(a); see N.Y. Pet. Br. 16, 18-26, 27-28, 30-34.

Congress's declaration of policy does not trump the specific jurisdictional rules set out in Section 201(b). In *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964), the Court explained that whereas "Section 201(b) embodies a clear grant of power," Section 201(a) is "merely a 'policy declaration . . . of great generality'" that "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *Id.* at 215 (quoting *Connecticut Light & Power*, 324 U.S. at 527).

In any event, Section 201(a) states the same rule as Section 201(b): the Commission has jurisdiction over wholesale sales of energy in interstate commerce and, independently, over the transmission of energy in interstate commerce. Even if Section 201(a)'s "ambiguous reference to 'matters . . . subject to regulation by the States'" (*United States* v. *Pub. Utils. Comm'n (California PUC)*, 345 U.S. 295, 308-309 (1953)) were read as covering all matters that traditionally have been regulated by the States (see N.Y. Pet. Br. 27-28), that would not help New York. The States have *not* traditionally regulated unbundled interstate transmission associated with retail sales.

In that regard, it is important to emphasize the fallacy of New York's repeated assertions (N.Y. Pet. Br. 8-9, 27, 35) that the only difference between today's unbundled transmission and the bundled retail service that Congress had in mind in 1935 "is a change in bill format." *Id.* at 8; see also Enron Br. 18, 37. As used in Order No. 888, "unbundling" is one aspect of the Commission's broader concept of "open access," under which public utilities are required to provide nondiscriminatory access to their transmission systems so that purchasers of power have a meaningful opportunity to obtain power across the grid from alternative suppliers. 1 J.A. 50-52, 106. The Commission has not asserted jurisdiction over unbundled retail transmission simply because a public utility *bills* its retail customers separately for generation and transmission. Rather, the Commission's open-access tariff and its jurisdiction over rates, terms, and conditions of interstate transmission in connection with retail sales apply when the traditional, bundled transaction "is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier)," and the customer can choose an energy supplier. 1 J.A. 349-350; see 2 J.A. 593-594. The defining difference between bundled retail service and unbundled services is the customer's opportunity to choose a different power supplier if the local public utility fails to offer a competitive price and quality of service. And as the Commission recognized, that opportunity to choose is not meaningful unless alternative suppliers have access to essential transmission facilities on nondiscriminatory terms and conditions. 2 Pet. App. 558a.

New York also suggests (N.Y. Pet. Br. 24 n.12, 36, 40) that Section 206(d) of the FPA, 16 U.S.C. 824e(d), shows that Congress did not intend to give the Commission jurisdiction to set rates for any services associated with retail sales of energy. See also Cal. Br. 17-18. Section 206(d) authorizes the Commission to "investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy." 16 U.S.C. 824e(d). That authority would be useful, for example, when a single public utility generates electric power in one State and sells it to retail customers in another State, or when a single utility's service area straddles a state line.[17] Consistent with Section 206(d), Order No. 888 respects the States' "authority to establish a rate governing the sale of * * * energy" (16 U.S.C. 824e(d)) in those interstate settings, even when the transmission service is unbundled from the retail sale of energy. Although the Commission would regulate rates for transmission service, the State would regulate the sale of energy, and, in connection with that state regulation, the Commission could provide information pursuant to Section 206(d) regarding production or transmission costs that are outside the State's jurisdiction. See 1 J.A. 354-355, 425-430.

New York further argues (N.Y. Pet. Br. 33-34, 36) that Section 212(h) of the FPA, 16 U.S.C. 824k(h), forecloses Commission jurisdiction over unbundled retail transmission services in interstate commerce. As the plain language of Section 212(h) states, and as the Commission explained in Order No. 888, that provision "prohibit[s the Commission] from *ordering* transmission directly to an ultimate consumer." 2 J.A. 596 (emphasis in original); see note 11, *supra*. The Commission respected that limitation by ordering public utilities to provide "functional unbundling" of transmission services only in the context of wholesale transactions. See 1 J.A. 106, 350. A public utility is not required to file a federal

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[17] See H.R. Rep. No. 1318, 74th Cong., 1st Sess. 29 (1935) ("This subsection reaches those situations where electric energy is transmitted in interstate commerce by the same company which distributes it locally, and will greatly aid State commissions in fixing reasonable rates in such cases.").

tariff for unbundled interstate transmission in connection with retail sales unless the utility offers that transmission service voluntarily or state regulators—not federal regulators—allow retail competition by mandating the provision of such a transmission service. See 2 J.A. 695 (pro forma tariff § 1.11, limiting retail customers' eligibility for tariffed transmission service to customers served voluntarily or as part of a state retail access program).

2. The Act's legislative history, on which New York principally relies, is equally inconsistent with New York's theory of the case. The Senate Report on the Act states that Congress assigned the FPC jurisdiction over interstate transmission even "where there is no sale" of the energy being delivered. That statement confirms that the Commission's transmission jurisdiction is not limited to transmission accompanied by a wholesale sale of electric energy. S. Rep. No. 621, *supra*, Pt. 1, at 19; see also *id.* at 48 ("Jurisdiction is asserted also over all interstate transmission lines whether or not there is sale of the energy carried by those lines").[18] Other legislative history is to the same effect. See Enron Pet. Br. 23-24.

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[18] When Congress drafted the FPA, there already was a history of utilities providing transmission service for other utilities, without buying or selling the energy being transmitted. For example, in the *Attleboro* case, to which Congress responded when drafting the FPA, Seekonk Electric Company in Massachusetts received power generated in Rhode Island by Narragansett Electric Lighting Company, and carried that power over Seekonk's transmission lines to Attleboro Steam & Electric Company (also in Massachusetts), which had purchased the power from Narragansett. See *Attleboro Steam & Elec. Co.* v. *Public Utils. Comm'n*, 129 A. 495, 496 (R.I. 1925), aff'd, 273 U.S. 83 (1927).

California suggests that when the Senate committee said that Section 201 of the FPA gives the FPC jurisdiction over interstate transmission when there is no sale of energy, it actually meant that Section 206(d) allowed the FPC to provide accounting information to support the States' exercise of *their* jurisdiction in situations where there is a sale at retail but not at wholesale. Cal. Br. 17 & n.9. Even California seems not to take that

More generally, Congress intended to ensure that the FPC would be able to oversee those services and facilities that state regulators could not lawfully, or effectively, regulate. Congress's overriding concern was that there never be a jurisdictional void. See *Louisiana Power & Light*, 406 U.S. at 640-641; *Arkansas Elec. Coop.*, 461 U.S. at 384 ("Congress' purpose in 1935 was to fill a regulatory gap, not to perpetuate one."); S. Rep. No. 621, *supra*, Pt. 1, at 48.

New York's narrow reading of Section 201 would defeat that paramount legislative intent. If the State in which the retail customer is located has jurisdiction to regulate all unbundled transmission associated with a retail sale, there would be a large regulatory gap when the retail customer purchases power from a supplier in a distant State, and that supplier requires transmission service from intervening out-of-state utilities to deliver the power. See 1 J.A. 427. The intervening transmission would be beyond the jurisdictional reach of the consumer's State. Thus, under New York's theory, those out-of-state transmission services would not be subject to meaningful regulation.

The most important fact about New York's reliance on legislative history, however, is that New York is unable to identify any statement indicating an actual congressional intent that if interstate transmission were separated from the associated retail sale of energy, the unbundled transmission would be subject to exclusive state regulation. There is no such evidence, because "the legislative history of the FPA * * * grew out of a market structure in which electricity and transmission generally were bought and sold

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strained reading of the Senate Report seriously, for it offers (*id.* at 17-18 n.10) two alternative theories. Like California's principal theory, however, both of the alternative theories implausibly assume that the Senate Report's discussion of federal transmission jurisdiction under Section 201(b) actually addressed the FPC's powers under entirely different, and unidentified, provisions of the Senate bill.

on a bundled basis." 1 J.A. 347. Accordingly, when legislators stressed that federal regulators would not "fix the rate of delivery" of electric power (see N.Y. Pet. Br. 24), and when the FPC noted that it lacked "authority over local rates" (see *id.* at 25-26), they were saying nothing more than what the Commission said in Order 888: Under the FPA, the States "clearly retain[] jurisdiction over" retail sales of power. 1 J.A. 350.[19]

3. New York admits (N.Y. Pet. Br. 12) that in 1935 Congress did not envision unbundling of retail transmission from retail sales of energy. But New York attempts to turn that fact to its advantage by arguing (*id.* at 13-17) that, as a matter of "preemption" law, the court of appeals in these cases erred by upholding the Commission's jurisdictional ruling absent "clear and manifest" Congressional intent regarding unbundled transmission. New York is mistaken on several counts.

First, New York's premise—that the Commission is seeking to seize jurisdiction over a service that the States traditionally have regulated (N.Y. Pet. Br. 14-15)—misstates the situation. Given that unbundled transmission in connection with retail sales is a new service, the Commission's task was not to decide whether historical state jurisdiction should

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[19] Likewise, New York is mistaken when it says (N.Y. Pet. Br. 17) that the Commission has changed its interpretation of Section 201. The statements cited by New York (*id.* at 21-22, 25-26, 31 & n.14, 41, 42 n.26) simply, and consistently, acknowledge the States' jurisdiction over bundled retail sales and local distribution. They do not address jurisdiction over unbundled retail transmission in interstate commerce. In his Senate testimony, for example, FPC Solicitor DeVane distinguished the interstate wholesale sales that would be regulated by the FPC from "energy that is transmitted in interstate commerce by a particular company and sold by that company to consumers," which the States would continue to regulate. Mr. DeVane did not address any other potential retail arrangements. *Public Utilities Holding Co. Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess., Pt. 2, at 250 (1935).

be "preempted," but to determine whether the new service comes within the States' unquestioned jurisdiction over bundled retail sales, or, rather, the Commission's clearly established jurisdiction over transmission in interstate commerce. See 2 J.A. 593-595; see generally *West* v. *Gibson*, 527 U.S. 212, 218 (1999) ("Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances").

Second, the court of appeals' affirmance did not depend upon "the deferential standard of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." N.Y. Pet. Br. 17 n.8.; see *id.* at 16. As the court of appeals stated, its primary holding was that the "clear[] and unambiguous[]" language of Section 201, as well as this Court's decisions in *Jersey Central* and *Florida Power*, compel the conclusion "that the FPA gives [the Commission] the authority to regulate transmissions at issue here, whether retail or wholesale." 1 Pet. App. 32a, 34a. *Chevron* deference was an alternative basis for upholding the Commission's jurisdiction. See *id.* at 34a-35a.[20]

Third, New York ignores *stare decisis* principles. Cases such as *Jersey Central*, *Connecticut Light & Power*, and *Florida Power* provide "cardinal and guiding" interpreta-

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[20] *Solid Waste Agency* v. *United States Army Corps of Engineers*, 121 S. Ct. 675 (2001), has no relevance even with respect to the court of appeals' alternative holding. See N.Y. Pet. Br. 16. In *Solid Waste Agency*, the Court declined to give *Chevron* deference to an agency interpretation that "push[ed] the limit of congressional authority" and therefore raised "significant constitutional questions." 121 S. Ct. at 683. In this case, the Court has already decided as a matter of constitutional law that "generation, transmission, distribution and consumption are so fused and interdependent that the whole enterprise is within the reach of the commerce power" if the utility connects to an interstate grid. *Connecticut Light & Power*, 324 U.S. at 529-530. The issue is whether, as a statutory matter, Congress chose to exercise its power to regulate unbundled retail transmission.

tions of Section 201 (*California* v. *FERC*, 495 U.S. 490, 497-499 (1990)), upon which the Commission properly relied. See *Maislin Indus., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").

Fourth, New York disregards the presumption *in favor* of federal jurisdiction under Section 201, where such jurisdiction is necessary to fill a possible jurisdictional void. As noted above, "Congress desired regulation by federal authority rather than non-regulation." *Louisiana Power & Light*, 406 U.S. at 641 (citation and internal quotation marks omitted). Therefore, as this Court has held, the enumerated exceptions to federal jurisdiction stated in Section 201 "are to be strictly construed." *California PUC*, 345 U.S. at 310. New York's proposed approach of forbidding federal regulation unless there is affirmative evidence of congressional intent that the statutory exceptions will *not* apply, risks creating the very jurisdictional vacuum that Congress wanted to avoid.

In other cases that presented questions of federal jurisdiction under Part II of the FPA—such as *Jersey Central*, *Connecticut Light & Power*, and *Florida Power*—this Court has straightforwardly "construe[d] § 201(b) as it is written, and as its legislative history indicates it was intended," without applying the anti-federal gloss suggested by New York. *New England Power*, 455 U.S. at 343; see *Arkansas Elec. Coop.*, 461 U.S. at 379 (Part II of FPA "shifted this Court's main focus—in determining the permissible scope of state regulation of utilities—from the constitutional issues * * * to analyses of legislative intent."). The Court has taken the same approach when applying analogous jurisdictional provisions. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 359, 376-377 n.5

(1986) (treating resolution of conflict between federal and state telecommunications regulation as an ordinary matter of statutory interpretation). Contrary to New York's thesis, nothing in this Court's decisions suggests that the Commission or the court of appeals should have applied a presumption against federal jurisdiction.

D. Policy Considerations Also Do Not Support New York's Interpretation

Finally, New York argues (N.Y. Pet. Br. 46-48) that Order No. 888 will undermine the States' ability to ensure that consumers receive reliable retail electric service at just and reasonable rates. California similarly maintains (Br. 27-30) that the Commission lacks statutory authority to regulate unbundled retail transmission adequately, and that the Commission has made the wrong policy choices in the past.

Those policy arguments are "properly addressed to Congress, not to the Courts." *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 423 (1975).[21] Furthermore, New York offers nothing to support its assertion that the Commission's regulation of unbundled retail transmission will hamper regulation of facilities and services within the States' jurisdiction. The Commission specifically clarified that, even if a State chooses to order retail unbundling, it retains authority under Order No. 888 over local matters such as power production, customer service, and local service reliability, in addition to its authority over rates for retail sales of energy. 1 J.A. 351-355. The Commission also committed—when exercising its jurisdiction over unbundled transmission in interstate commerce in connection with retail sales—to

[21] New York's invocation of *Chemehuevi Tribe* (N.Y. Pet. Br. 15) is wholly misplaced. In that case, the Court rejected an argument that statutory language should be disregarded when the policy choice underlying that language is outmoded. 420 U.S. at 422-424. Here, by contrast, the Commission applied the plain language of Section 201 to new circumstances.

cooperate with state regulators on various matters that implicate their expertise and concerns and to afford deference to the views of the States when applying its test for identifying local distribution facilities. 1 J.A. 355-360. Finally, while transmission assets may be shifted from state to federal jurisdiction as a result of retail unbundling, the resulting accounting issues would be "commonplace." *FPC* v. *Conway Corp.*, 426 U.S. 271, 280 & nn. 6, 7 (1976).

Nor is there merit to California's argument (Br. 28-29) that the Commission lacks the authority it needs to ensure adequate and nondiscriminatory transmission service. Order No. 888 requires public utilities to provide their unbundled transmission services to all eligible customers under the same terms and conditions that apply to the utility's own operations. See 2 J.A. 440-443 (18 C.F.R. 35.28(c), requiring public utilities to file open-access transmission tariffs and to obtain transmission service under those generally available tariffs). The Commission's pro forma tariff also obligates the public utility to take appropriate steps to provide sufficient transmission capacity to serve all tariff customers on a nondiscriminatory basis. 2 J.A. 729, 767-770 (tariff §§ 15.4, 32).

New York argues (N.Y. Pet. Br. 48) that Order No. 888 will deter States from requiring unbundling of transmission from retail sales, because unbundling would trigger federal jurisdiction and "diminish[]" the States' own jurisdiction over transmission. That contention assumes that States regulate to maximize their own jurisdiction, rather than to promote the public interest—a proposition New York itself rejects as respondent in No. 00-809. See N.Y. Resp. Br. 18-23. Indeed, numerous States have adopted "retail choice" programs since the Commission issued Order No. 888.[22]

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[22] Before Order No. 888, 12 States had acted to give retail customers a choice of power suppliers. 1 J.A. 95 & n.101. As of May 2001, 25 States had adopted such programs by legislation or administrative order. See

California suggests (Br. 1) that the jurisdictional lines identified in Order No. 888 have contributed to that State's current energy crisis. Enron disagrees. Enron Resp. Br. 16 n.6. The Commission has found that the principal causes of California's electricity crisis were state regulations that required all utilities to purchase their wholesale requirements through a spot market exchange, froze retail rates at levels lower than wholesale rates, and inhibited construction of new electric generating capacity. *San Diego Gas & Elec. Co.* v. *Sellers of Energy and Ancillary Servs. into Mkts. Operated by the Cal. Indep. Sys. Operator and the Cal. Power Exch.*, 93 F.E.R.C. ¶ 61,121, at 61,351, 61,353, 61,360 (2000), mandamus denied, 245 F.3d 1110 (9th Cir. 2001). Those causal factors have nothing to do with regulation of unbundled transmission. Order No. 888 likewise does not implicate the disagreement regarding state control over the governing board of the California Independent System Operator, to which California refers (Br. 27-28). That disagreement, moreover, has been resolved. See *Western Power Trading Forum* v. *FERC*, 245 F.3d 798, 799-800 (D.C. Cir. 2001).

II. THE COMMISSION REASONABLY CONCLUDED THAT CONGRESS HAS NOT AUTHORIZED FEDERAL REGULATION OF THE TRANSMISSION COMPONENT OF BUNDLED RETAIL SALES OF ELECTRIC ENERGY

In No. 00-809, petitioner Enron, which supports the Commission's determination that the FPA establishes federal jurisdiction over *unbundled* transmission for retail sales, argues that the court of appeals erred by deferring to the Commission's further conclusion (1 J.A. 349-350) that it lacks jurisdiction to regulate the transmission provided by

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Energy Information Administration, U.S. Dep't of Energy, *Status of State Electric Industry Restructuring Activity as of May 2001* (available at <http://www.eia.doe.gov/cneaf/electricity/chg_str/regmap.html>).

public utilities in their *bundled* retail sales. See 1 Pet. App. 35a. Enron contends (Enron Pet. Br. 21) that "Section 201(b) * * * explicitly gives [the Commission] jurisdiction, without any stated limitation or qualification, over all interstate transmissions * * * for both wholesale and retail sales," and that the Commission disregarded that "plain meaning" by "read[ing] into section 201(b) an exception for transmissions that are bundled at retail." Enron further suggests (*id.* at 41-43) that applying the Commission's pro forma open-access tariff to transmission that is bundled with a retail sale of energy is necessary to prevent public utilities from providing inferior transmission to transmission customers who do not also buy energy from the utility at retail.

Enron's understanding of the Commission's transmission jurisdiction is correct—as far as it goes. As the court of appeals held (1 Pet. App. 32a-34a), and as we have demonstrated in Part I, above, Section 201(b) assigns the Commission jurisdiction over interstate transmission whether it is used in conjunction with a wholesale sale of energy or a retail sale of energy. But Section 201(b)(1) also assigns the States jurisdiction over "any * * * sale of electric energy" that is not "at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). The issue faced by the Commission, therefore, was whether a public utility's sale at retail of delivered energy in a single transaction—in a State that does not permit consumers to choose their power supplier—constitutes (1) a retail sale of energy within the States' jurisdiction, or (2) a state-regulated retail sale of energy *as well as* a federally regulated transmission service. See 1 J.A. 349-350.

The court of appeals correctly concluded (1 Pet. App. 34a) that "Congress has not directly addressed th[at] precise question" with unambiguous language. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Nothing in Section 201(b) establishes the proper characterization of a bundled transaction. Whereas Section 201(b) clearly gives the Commission jurisdiction over transmission, and clearly gives the States jurisdiction over non-wholesale sales of energy, "[t]he statute is much less clear about exactly where the lines between those activities are to be drawn." 1 Pet. App. 35a.

Section 201(a) does not resolve the ambiguity. While federal jurisdiction "extend[s] only to those matters which are not subject to regulation by the States," 16 U.S.C. 824(a), that declaration of policy is, as this Court has held, itself ambiguous. *California PUC*, 345 U.S. at 308-309.

The legislative history of the FPA is inconclusive as well. Enron cites legislative history suggesting that the Act would give the Commission jurisdiction over interstate transmission "[w]hether it be wholesale or retail." Enron Pet. Br. 23 (quoting House hearings) (emphasis omitted); see *id.* at 23-24 (discussing legislative history). Other legislative history, however, reflects an intent to "tak[e] no authority from State commissions" and to maintain "valid state authority" that was then being exercised. *New England Power*, 455 U.S. at 341 & n.7 (emphasis omitted). In particular, the committee reports state that "the authority of States to fix local rates"—which then referred to bundled rates for delivered power, including the transmission component, see 2 J.A. 593-594—"[wa]s not disturbed." H.R. Rep. No. 1318, *supra*, 27; accord S. Rep. No. 621, *supra*, Pt. 1, at 48. Unlike the Commission's exercise of jurisdiction over the new service of unbundled retail transmission, the exercise of federal jurisdiction over the transmission component of traditional bundled retail service would affect historical state regulation and local rates.

Louisiana Power & Light also was not "controlling" (Enron Pet. Br. 22) on the record before the Commission in the Order No. 888 proceeding. The Court held in *Louisiana Power & Light* that the Commission had authority to direct interstate natural gas pipelines to curtail deliveries to all customers in time of shortage, and that such curtailment regulations did not interfere with the States' exclusive authority over retail sales of gas. 406 U.S. at 623-647. The critical considerations under the Natural Gas Act were that curtailment rules did not implicate local rate-setting, *id.* at 637-638, and that leaving allocation of scarce gas to the States would "create contradictory regulations that cannot possibly be equitably resolved by the courts," *id.* at 634. Because the federal curtailment requirements addressed transportation rather than retail sales, *id.* at 638-640, and because state rationing of interstate gas was not feasible, *id.* at 641, the curtailment requirements were permissible.

Neither of those considerations was present on the record before the Commission in the Order No. 888 proceeding. Enron acknowledges (Enron Pet. Br. 26) that federal regulation of the transmission component of a bundled sale potentially implicates retail rate-setting. Furthermore, the record before the Commission did not establish that the current arrangement, under which the transmission component of bundled sales is subject to regulation as part of the regulation of retail sales, is unworkable. Cf. 1 J.A. 227 (finding that federal unbundling of retail transactions is not necessary to prevent discrimination), 2 Pet. App. 453a-454a (noting same).

Enron has never provided clear record support—in a rehearing petition before the Commission, in the court of appeals, or in this Court—for its argument (which the court of appeals did not address, see 1 Pet. App. 35a) that federal action with respect to the transmission component of a bundled retail sale is necessary to fill a gap created by practical limitations on state regulation. Nor has Enron shown that its proposal for a categorical extension of the open-access tariff requirement to bundled retail sales is necessary to ensure just, reasonable, and nondiscriminatory terms for services that *are* currently regulated by the Commission.[23]

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[23] The Commission has concluded a rulemaking regarding Regional Transmission Organizations (RTOs) that addresses some of Enron's

Citing *Northern States Power Co.* v. *FERC*, 176 F.3d 1090 (8th Cir. 1999), cert. denied, 528 U.S. 1182 (2000), Enron suggests (Enron Pet. Br. 24-25 n.17, 42 & n.27) that, absent application of the open-access tariff to bundled retail transmission, public utilities facing a need to curtail their transmission will favor their own bundled retail service and disadvantage customers of unbundled transmission obtained under Order No. 888's open-access rules. In *Northern States Power*, the Commission had rejected proposed curtailment provisions of a public utility's federal open-access transmission tariff that favored the utility's retail customers over wholesale transmission customers who are unquestionably subject to the Commission's jurisdiction. The Eighth Circuit held that the Commission exceeded its authority under the Act. 176 F.3d at 1093-1096. While the Commission continues to believe that it has authority to require public utilities to treat customers of unbundled interstate transmission in a manner that is comparable to the treatment afforded bundled transmission users, and thereby to prevent discrimination against users of federally regulated services, the Commission has also concluded that even under the court of appeals' decision, it is not powerless to address such discrimination.[24]

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concerns. Order No. 2000, *Regional Transmission Orgs.*, 65 Fed. Reg. 809, on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (2000), appeal pending *sub nom. Public Utils. Dist. No. 1* v. *FERC*, No. 00-1174 (D.C. Cir. to be argued Oct. 17, 2001). An RTO serves as the sole transmission provider within its region, providing all transmission for wholesale power transactions as well as bundled and unbundled retail power transactions. The Commission has provisionally approved three RTOs, and additional applications are pending. Also, Enron could in the future petition the Commission to revisit its resolution of the jurisdictional ambiguity in the FPA on the basis of changed industry conditions. See *Chevron*, 467 U.S. at 863-864.

[24] On remand from the court of appeals, the Commission recognized that a utility could depart from pro-rata transmission curtailment in the "rare circumstance[]" when the utility has exhausted all of its options for

In light of the equivocal language and history of the FPA and the limited record before the Commission, the court of appeals properly deferred to the Commission's reasonable decision not to override the States' historical regulation of transmission that is bundled with a retail sale of energy. See generally *Chevron*, 467 U.S. at 842-845.[25] The Commission's jurisdictional determination, in turn, resolves Enron's final argument (Enron Pet. Br. 33-44) that Section 206 of the FPA, 16 U.S.C. 824e, requires the Commission to exercise jurisdiction over the transmission involved in public utilities' retail operations, even if the relevant State favors traditional bundled sales. Section 206 authorizes the Commission to remedy undue discrimination with respect to matters subject to its jurisdiction. See 16 U.S.C. 824e(a). In light of the Commission's reasonable finding that it lacks jurisdiction over the transmission component of bundled retail sales

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avoiding transmission curtailment, and has established that the transmission customers that would be disproportionately affected by the curtailment have options to reduce their need for transmission capacity. The Commission, however, required the utility to adopt specific tariff provisions for ensuring that all options for avoiding curtailment are first exhausted, and for affording those customers who would carry an extra burden either alternative supply options or compensation, as well as reduced rates for the inferior quality of service they are provided. *Northern States Power Co. (Minn.)*, 89 F.E.R.C. ¶ 61,178, at 61,553 (1999).

[25] Enron relies on the supposedly "plain language of the statute" (Enron Pet. Br. 20; see *id.* at 43), and does not dispute that, if the statute and its legislative history are ambiguous, the Commission has provided a "reasonable interpretation" (*Chevron*, 467 U.S. at 844) of the FPA. Likewise, Enron does not challenge the court of appeals' holding (1 Pet. App. 34a-35a) that an agency's interpretation of a statutory provision that defines the scope of the agency's jurisdiction is entitled to *Chevron* deference. This Court has applied the same rule. See *CFTC* v. *Schor*, 478 U.S. 833, 844-845 (1986); *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984); see also *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring in the judgment); *Dole* v. *United Steelworkers*, 494 U.S. 26, 54-55 (1990) (White, J., dissenting).

under Section 201, the Commission was not required to regulate that transmission component under Section 206.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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